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UBER TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA and MICHAEL HINGSON,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC.,

Defendant.

Case No. 3:14-cv-04086-NC

DEFENDANT UBER TECHNOLOGIES, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[F.R.C.P. 12(b)(1) and 12(b)(6)]

Date: December 3, 2014
Time: 1:00 p.m.
Location: Courtroom A, 15th Floor
San Francisco Federal Courthouse

Trial Date: None set.
Complaint Filed: September 9, 2014

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on December 3, 2014, in Courtroom A, 15th Floor of the U.S. District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, at 1:00 p.m., or as soon thereafter as counsel may be heard, Defendant UBER TECHNOLOGIES, INC. will move the Court to dismiss this action, pursuant to Federal Rule of Civil Procedure Rules 12(b)(1) and (b)(6).

1. Plaintiffs Michael Hingson's ("Hingson") and National Federation of the Blind of California's ("NFB") First Cause of Action for disability discrimination in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* ("ADA") is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to sue. Neither Plaintiff Hingson nor Plaintiff NFB meets the threshold Constitutional standing requirement necessary to seek the injunctive relief sought under the ADA.

2. Plaintiffs' Second Cause of Action for disability discrimination under the California Unruh Civil Rights Act, California Civil Code §§ 51 and 52 ("Unruh") is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to sue. Neither Hingson nor NFB personally experienced discriminatory treatment and accordingly, they are not "persons aggrieved" with standing to sue under Unruh.

3. Plaintiff Hingson's Third Cause of Action for disability discrimination under the California Disabled Persons Act, California Civil Code §§ 54-54.3 ("DPA") is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiff Hingson lacks standing under the heightened pleading standard for a damages claim under the DPA.

4. Plaintiffs' Fourth Cause of Action for declaratory relief based on the violations asserted in Plaintiffs' First, Second and Third Causes of Action is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to pursue those underlying Causes of Action.

5. Even if Plaintiffs could demonstrate the requisite standing to sue, their First Cause of Action under the ADA is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) because it does not constitute a proper cause of action to the extent it is based on the allegation that

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Uber is a public accommodation or that Uber owns, leases or operates a place of public accommodation.

6. Even if Plaintiffs could demonstrate the requisite standing to sue, their Second Cause of Action under Unruh is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) because it does not constitute a proper cause of action to the extent it is based on the allegation that Uber is a public accommodation or that Uber owns, leases or operates a place of public accommodation as defined by the ADA.

7. Even if Plaintiff Hingson could demonstrate the requisite standing to sue, his Third Cause of Action for damages under the DPA is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) because it does not constitute a proper cause of action to the extent it is based on the allegation that Uber is a public accommodation or that Uber owns, leases or operates a place of public accommodation as defined by the ADA.

The motion will be based upon this notice of motion and motion and upon Defendant's memorandum of points and authorities, Defendant's request for judicial notice, the declaration of Michael Colman, the pleadings and papers filed herein, and any other matters considered by the Court.

Dated: October 22, 2014

/s/*Andrew M. Spurchise*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Uber Technologies, Inc. ("Uber") is a technology company that acts as a conduit between passengers looking for transportation and transportation providers looking for passengers. Specifically, Uber provides the technology, through its smartphone application (the "app"), that allows passengers and transportation providers to make a "match" based on their location.

Uber's mission is to connect its users to safe, reliable rides as efficiently as possible. Uber values all of its users, but is on the cutting edge of connecting individuals with disabilities to reliable transportation options. Among other things, this includes, in some cities, exploring partnerships with taxi and limousine companies that offer wheelchair accessible vehicles as a means of increasing the availability of these vehicles to Uber's disabled users. Moreover, as admitted in the Complaint, Uber's technology has greatly increased the mobility and freedom of Uber users with disabilities, particularly the blind.

Nevertheless, Plaintiffs National Federation of the Blind of California ("NFB") and Michael Hingson ("Hingson"), despite implicitly acknowledging that blind individuals use the app to book transportation on a regular basis without incident, accuse Uber of failing to do enough to accommodate blind individuals with service animals. However, Plaintiffs' Complaint is fatally flawed and should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) or, in the alternative, 12(b)(6). Most critically, Plaintiffs both lack standing to pursue these claims: Hingson because he has not suffered cognizable legal injury under the ADA, Unruh or the DPA; NFB because it has no legal right to pursue the sweeping relief it asks the Court to impose upon Uber, including by regulating the conduct of thousands of transportation providers using its platform across the country.

Even if the Court determines one or both Plaintiffs have standing (and they do not), Plaintiffs' ADA and derivative state law claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) to the extent Plaintiffs' allege Uber is a place of public accommodation or owns, leases or operates a place of public accommodation.

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II. FACTUAL SUMMARY

A. Defendant Uber Technologies, Inc.

As stated in the Complaint, Uber has developed a smartphone application ("app") that enables its customers to use their smartphones to request pre-arranged transportation services. (Complaint, ¶ 22.) Uber offers the app as a tool to facilitate pre-arranged transportation services. Uber licenses the use of the Uber app to transportation providers. (Declaration of Michael Colman, ["Colman Decl."], ¶¶ 3-5, Exh. A.)[1] Uber does not own, lease or operate any vehicles for transporting users, and does not employ people to operate vehicles. (Colman Decl., Exh. A; Uber's Request for Judicial Notice ["RJN"], Exh. A at 24.)[2]

B. The UberX Platform.

Through the app, Uber users can connect with available drivers offering a variety of transportation options. Among these options, the uberX platform connects users to independent transportation providers operating cost-efficient, everyday vehicles.[3] (Colman Decl., ¶ 5.)

Individuals seeking to use the Uber app to request a ride must first accept Uber's User Terms and Conditions. (Colman Decl., ¶ 8, Exh. B.) Once a user accepts the User Terms and Conditions, he or she can log on to the app and select the type of service (e.g., uberX) he or she desires. After the service is selected, the user can request a ride through whichever platform they prefer. (*Id.*)

Plaintiff Michael Hingson has not created a Uber user account, accepted the User Terms and Conditions, or taken a ride booked through the uberX platform. (Complaint, ¶ 48.)

Similar to the users, any independent transportation provider who wishes to access Uber's uberX software platform to book passengers must enter into a "Software Sublicense & Online Services Agreement" ("Sublicense Agreement") with Uber Technologies, Inc.'s wholly-owned subsidiary, Rasier, LLC. (Colman Decl., ¶ 6, Exh. A.) There are several thousand transportation

[1] Exhibit A to the Declaration of Michael Colman is the Rasier Software Sublicense & Online Services Agreement. Rasier (in California, Rasier-CA LLC) is a wholly-owned subsidiary of Uber Technologies, Inc. For purposes of this motion, Uber and Rasier are collectively referred to as "Uber."

[2] Exhibit A to Uber's RJN is the California Public Utilities Commission's "Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry."

[3] Only transportation arranged through the uberX platform is at issue in this case.

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providers authorized to use the uberX platform to book passengers who are currently operating in California. (Colman Decl., ¶ 7.)

The very outset of the Sublicense Agreement states that transportation providers independently operate their own transportation businesses. The Sublicense Agreement is explicit that any relationship between Uber and third party transportation providers is *solely* in the nature of a contractual relationship between separate business ventures:

> You represent that you are an independent contractor engaged in the independent business of providing the transportation services described in this Agreement and further represent that, as of the date of execution of this Agreement, you currently possess a valid driver's license and all licenses, permits and other legal prerequisites necessary to perform rideshare or P2P transportation services, as required by the states and/or localities in which you operate.
>
> . . . .
>
> **Relationship of Parties**
>
> This Agreement is between two co-equal, independent business enterprises that are separately owned and operated. The Parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The Parties are not employees, agents, joint venturers or partners of each other for any purpose.

(*Id.* at 3, 9.) The Sublicense Agreement also expressly provides that Uber may not direct and control the work of transportation providers or their drivers:

> The Company shall have no right to, and shall not, control the manner or prescribe the method you use to perform accepted Requests, subject to the terms of this Agreement. You shall be solely responsible for determining the most effective, efficient and safe manner to perform the services relating to each Request, subject to the terms of this Agreement and the applicable User specifications. The Parties acknowledge that any provisions of this Agreement reserving certain authority in the Company have been inserted solely to achieve compliance with federal, state, or local laws, rules, and interpretations thereof.

(*Id.* at 3.)

The Sublicense Agreement continues:

> Subject only to requirements imposed by law, Request parameters, User specifications, and/or as otherwise set forth in this Agreement, you shall direct in all aspects the operation of the equipment used in the performance of this Agreement and shall exercise full discretion

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> and judgment as an independent business in determining the means and methods of performance under this Agreement.

(*Id.* at 4.)

C. UberX, As A "TNC", Complies With Requirements Imposed By The California Public Utilities Commission.

In September 2013, the California Public Utilities Commission ("CPUC") promulgated new rules applicable to transportation network companies ("TNCs"). (Uber's RJN, Exh. A.) The CPUC defines TNC as follows: "an organization…operating in California that provides prearranged transportation services for compensation using an online-enabled application ('app') or platform to connect passengers with drivers using their personal vehicles." (*Id.* at 65.) In promulgating these rules, the CPUC expressly distinguished "taxi services" from the transportation that can be arranged through the uberX platform:

> …1) before a passenger can request a ride, the passenger must download the software application, provide identification information and agree to the TNC service agreement, and 2) for a particular trip, the passenger must input information regarding current location, and finally, 3) a TNC driver cannot be hailed on the street similar to a taxicab where no information is shared until the passenger enters the vehicle.

(*Id.* at p. 66.)

The CPUC explained that it recognizes and regulates three modes of passenger transportation for compensation: (1) taxi services (regulated by cities and/or counties), (2) charter-party carrier services and (3) passenger-stage companies (regulated by the CPUC). (*Id.* at 65.) It found that Uber, with respect to the uberX platform only, is a TNC, and required to obtain a Class P charter-party carrier permit. (*Id.* at 72.) As stated by the CPUC, unlike other charter-party carriers, Uber is "not permitted to itself own vehicles used in its operation or own fleets of vehicles." (*Id.* at 24.)

As a TNC, Uber is obligated to comply with certain safety requirements as it relates to the transportation providers who offer transportation services through the uberX platform. (*Id.* at 26-29.) However, as a matter of law, these controls do not alter the independent business relationship between Uber and the third party transportation providers who offer transportation using the uberX

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platform.[4] Beyond these requirements, and subject to the terms of the Sublicense Agreement, Uber is contractually prohibited from exercising control over the transportation service provided.

III. UBER'S MOTION TO DISMISS SHOULD BE GRANTED

A. Plaintiffs' Complaint Should Be Dismissed Pursuant To FRCP 12(b)(1) Because Plaintiffs Lack Standing.

Plaintiffs have the burden of establishing standing sufficient to defeat this motion to dismiss. *Savage v. Glendale Union High School,* 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). In deciding the motion, the Court accepts as true any uncontroverted allegations in the complaint and resolves any conflicts between the facts contained in the parties' evidence in the Plaintiffs' favor. *Id.* However, for jurisdictional purposes, a court "may not assume the truth of the allegations in a pleading which are contradicted" by other record evidence. *Alexander v. Circus Circus Enters., Inc.*, 972 F.2d 261, 262 (9th Cir. 1992). Moreover, as to the uncontroverted allegations in the Complaint, the Court need not accept as true legal conclusions or inferences that are unsupported by the facts set out in the Complaint. *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009). The complaint must contain "sufficient jurisdictional facts to state a claim which is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007).

1. Dismissal Of The First Cause Of Action Is Warranted Because Plaintiffs Cannot Meet The Threshold Standing Requirements.

a. Plaintiff Hingson has not suffered an injury-in-fact and does not face an immediate threat of repeated injury.

To establish standing to bring this Complaint, Hingson must demonstrate (1) that he has suffered an injury-in-fact; (2) that the injury is traceable to Uber's actions; and (3) that the injury can be redressed by a favorable decision. *Chapman v. Pier I Imps. (U.S.), Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). In addition, "to establish standing to pursue injunctive relief, which is the only relief available to private plaintiffs under the ADA, [plaintiff] must demonstrate a 'real and immediate

[4] *SIDA of Hawaii, Inc. v. NLRB*, 512 F. 3d 853, 862-863 (9th Cir. 1975) ("the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship"); *see also, Southwest Research Institute v. UIAB*, 81 Cal. App. 4th 705, 709 (2000) (compliance with FAA and EPA training requirements not evidence of control); *Arnold v. Mut. Of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 588-589 (2011) (training required only with respect to compliance with state law directives regarding insurance sales did not constitute evidence of control).

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threat of repeated injury in the future.'" *Id.* Similarly, as the Supreme Court held in *Los Angeles v. Lyons*, 461 U.S. 95, 108-109 (1983), a plaintiff cannot establish standing to sue for injunctive relief merely by alleging that there is a policy and practice of discriminating generally. Instead, a plaintiff must show he is ***likely*** to suffer injury in the future related to his disability. Hingson does not and cannot meet this standard.

Hingson admits that he has not created an Uber user account, which means that he has yet to accept the User Term and Conditions, a condition precedent to even being authorized to request a ride via the uberX platform.

Hingson has never himself been denied transportation services from a transportation provider booked using the Uber app, and he does not (and cannot) allege that the Uber app itself somehow presents a barrier. Furthermore, Hingson has not alleged that Uber maintains a blanket rule banning service animals nor has he (or NFB, for that matter) alleged that *all* drivers on the uberX platform refuse to transport or mishandle blind individuals with service animals. Hingson admittedly asserts standing based on the "deterrent effect" doctrine.

Under the deterrent effect doctrine, "a disabled individual suffers a cognizable injury if he is deterred from visiting a noncompliant public accommodation ***because he has encountered barriers related to his disability there***." *Chapman*, 631 F.3d at 949 (emphasis added); *see, e.g., Pickern v. Holiday Quality Foods, Inc.,* 293 F.3d 1133, 1138 (9th Cir. 2002) (applying deterrent effect doctrine and finding plaintiff had suffered an "actual injury" for standing purposes where plaintiff had encountered accessibility barriers on a past visit to a market which deterred him from returning to the market even though he preferred to shop there); *Doran v. 7-Eleven, Inc*., 524 F.3d 1034, 1040 (9th Cir. 2008) (court found that plaintiff had standing where he had visited a 7-Eleven store on ten to twenty prior occasions but was currently deterred from visiting the store because of the accessibility barriers he had personally encountered in past visits).

Hingson claims he has been, and continues to be, deterred from creating an Uber user account and requesting rides through the uberX platform based on the fact that he is "aware of" various instances where uberX drivers refused to transport blind individuals with service animals. (Complaint, ¶ 3, 6.) Hingson has not alleged a single encounter or first-hand knowledge of any

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barrier to receiving transportation, along with his service animal, arranged through the Uber app. alleges that this "deterrence" constitutes an injury sufficient to confer standing.

While a disabled person is not required to engage in a futile gesture if there is "actual notice" that the defendant will discriminate, here Hingson has only alleged ***general, second-hand knowledge*** of ***various instances*** where uberX drivers allegedly refused to transport blind individuals with service animals.[5] *DeLil v. El Torito Restaurants*, 1997 U.S. Dist. LEXIS 22788, *12-13 (N.D. Cal. 1997) (while a plaintiff need not repeatedly suffer discrimination in order to assert her rights, "ADA plaintiffs who seek injunctive relief must still demonstrate that they themselves face a real and immediate threat of future harm."); *Resnick v. Magical Cruise Co.*, 148 F. Supp. 2d 1298, 1303 (M.D. Fla. 2001) (court found plaintiffs did not have standing because "even if Plaintiffs had alleged a concrete intention to cruise on one of [cruise line's] vessels, they would still lack the requisite reasonable grounds for their alleged belief that they would suffer discrimination. In short, there is no record evidence that Plaintiffs had knowledge at the inception of this suit of any alleged violations ***from personal observation or expert findings***."); *Moyer v. Walt Disney World Co.*, 146 F. Supp. 2d 1249, 1254 (M.D. Fla. 2000) (court found that plaintiff lacked standing to assert ADA claims where plaintiff did not visit the defendant amusement parks and provided "no evidence save inadmissible hearsay to show 'actual notice' of the alleged ADA violations at [the amusement parks]."). This is insufficient as a matter of law to confer standing to bring these claims.

Even if second-hand knowledge was legally sufficient to cause deterrence, Hingson fails to allege specific facts indicating how he became aware or from whom he learned of any alleged incidents of discrimination. He fails to identify the individual drivers who allegedly refused rides to blind individuals with service animals or mishandled service animals. His general "awareness" that certain transportation providers on the uberX platform (though not *all*) allegedly discriminated against blind individuals with service animals cannot constitute "actual notice" of discrimination on the part of every transportation provider on the uberX platform.

[5] For example, Paragraph 45 of the Complaint states "Plaintiffs are aware of other blind persons throughout California and the United States whom UberX drivers refused to transport because those individuals had service animals." *See also* Complaint, ¶ 48.

Hingson's alleged injury is the quintessential "conjectural or hypothetical" injury: ***if*** he set up an Uber account, agreed to the User Terms and Conditions, and requested a ride on the uberX platform, he ***might*** be denied access. This is insufficient to establish standing to pursue individual claims under the ADA or his derivative claims under state law. *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 946 (C.D. Cal. 2005) ("***past exposure*** to illegal conduct does not in itself show a present case or controversy regarding injunctive relief…if unaccompanied by any continuing, present adverse effects") (emphasis added); *cf. Fortyune v. Am. Multi-Cinema, Inc*., 364 F.3d 1075, 1080-81 (9th Cir. 2004) (where wheelchair bound plaintiff attended up to four movies per week and theater's discriminatory seating policy was ongoing, the court concluded plaintiff had established a "real and immediate threat" that the injury would be repeated sufficient to permit him to pursue injunctive relief).

Clark v. McDonald's, 213 F.R.D. 198 (D. N.J. 2003) is instructive here. There, the complaint, brought by advocacy organization Access Today and individual plaintiff Clark, alleged that Clark had visited numerous McDonald's restaurants in New Jersey and encountered various barriers. *Id.* at 203. The plaintiffs also alleged that other members of the advocacy organization Access Today had visited McDonald's restaurants in New Jersey and Pennsylvania and encountered various barriers. *Id.* Similar to the relief sought here, the plaintiffs sought injunctive relief against all the McDonald's-brand restaurants throughout the United States. *Id.* Defendants moved to dismiss the complaint primarily on the grounds that the plaintiffs lacked standing. *Id.* at 204. Individual plaintiff Clark did not allege actual notice of any ADA violation at any of the McDonald's restaurants ***he had not visited***. *Id.* at 230 (emphasis added). Instead, like Hingson, Clark alleged only that the discriminatory features of the restaurants were "generally known." *Id.*

With respect to that allegation, the court stated "it would be unreasonable for the Court to infer 'actual notice' of an ADA violation at a particular restaurant that Clark has not visited from whatever general knowledge he may possess about discriminatory features said to be commonplace at McDonald's restaurants." *Id.* Based on the lack of standing, the Court dismissed the claims brought by plaintiff Clark as to any restaurant Clark had not visited. *Id.* at 234. Here, Hingson has not attempted to ride in ***a single*** vehicle available on the uberX platform.

In *Moreno v. G&M Oil Co*., 88 F. Supp. 2d 1116 (C.D. Cal 2000), the court reached a similar conclusion. There, a plaintiff who sued G&M Oil Co. for an ADA architectural barrier violation at one gas station, moved to amend his complaint to add claims about similar barrier violations at 82 other gas stations owned by defendant. *Id*. at 1116. The court held as follows: "there is no showing this Plaintiff was subjected to or about to be subjected to discrimination at the 82 additional gas stations." *Id.* at 1117. Accordingly, the Court denied the motion for leave to amend stating that the plaintiff lacked standing to assert a claim based on a generalized grievance of architectural barriers at gas stations owned by G&M Oil where plaintiff was not personally discriminated against. *Id.* at 1118.

McDonald's and *Moreno* mandate the same result here. Because Hingson failed to establish both an injury-in-fact and an immediate threat of repeated injury, he lacks standing to bring any claim for injunctive relief under the ADA. Therefore, his First Cause of Action should be dismissed.

b. Plaintiff NFB lacks associational standing.

As with Hingson, Plaintiff NFB lacks standing to bring a claim for injunctive relief under the ADA, either as an association or in its own right.

Even where an association lacks standing to sue in its own right because it has not itself suffered an injury-in-fact, it will nevertheless have "standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

First, to the extent NFB bases its claim to standing on Hingson's alleged standing, that claim fails for the same reasons Hingson himself lacks standing.

The allegations specific to other NFB members are also insufficient to confer the broad associational standing sought by NFB. The Complaint sets forth a number of instances where individual NFB members were allegedly refused service by transportation providers who were booked using uberX in various cities in California, Texas and Massachusetts. (Complaint, ¶¶ 39-46.)

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Even assuming the individual NFB members satisfy the standing requirements on behalf of specific members as to specific transportation providers by asserting "actual notice" of discrimination by those transportation providers, it does not follow that they (or by extension NFB) have standing to assert a generalized grievance as to each and every transportation provider offering his or her services on the uberX platform statewide. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction).

Yet, the relief sought by NFB is ***virtually unlimited***, and requested as to each of the several thousand transportation providers operating in California. This is fatal to NFB's claim.

In *Small v. General Nutrition Cos*., 388 F. Supp. 2d 83 (E.D.N.Y. 2005), the court held that a disability rights organization lacked associational standing. There, plaintiff Disabled in Action ("DIA") brought suit against GNC alleging that various features of many of GNC's approximately 55 stores in New York City were not sufficiently accessible to the disabled. *Id.* at 85. Defendant moved to dismiss the complaint and argued that DIA lacked associational standing. *Id.* The court agreed, and dismissed the complaint. *Id.* at 97. The court explained as follows, "because associational standing exists only insofar as organization members have standing, ***associational standing may not be broader or more extensive than the standing of the organization's members***. Thus, the association would only have standing with respect to the specific stores at which the [DIA] member identified in the amended complaint has standing." *Id.* at 98 (emphasis added).

Here, NFB appears to seek injunctive relief with respect to the entire uberX platform and every single transportation provider offering services on that platform in California.[6] Accordingly, the Complaint improperly seeks to confer associational standing on NFB that is far more extensive

[6] Plaintiff NFB describes itself as the California chapter of a national organization. (Complaint, ¶ 1.) Presumably its members reside in California. Accordingly, Defendant reads the Complaint as seeking relief with respect to the uberX platform in California only. However, to the extent NFB seeks an injunction as to all transportation providers offering their services on the uberX platform nationwide, the relief sought is plainly inappropriate. Even assuming individual NFB members residing in California satisfy the standing requirements as to a number of transportation providers operating in California, they (and thus NFB) lack standing to seek an injunction as to those transportation providers nationwide, or even statewide.

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than the standing of its members. Because NFB cannot establish associational standing to recover the relief it seeks, its First Cause of Action should be dismissed.

c. Plaintiff NFB lacks standing to sue in its own right.

NFB also appears to assert (though not clearly) it has standing to sue in its own right (i.e. organizational standing): NFB "sues in furtherance of its extensive efforts and expenditure of resources in advancing its mission to improve independence of the blind." (Complaint, ¶ 20.) The Complaint asserts that Uber's alleged discrimination against NFB's members frustrates NFB's mission and diverts its resources. However, NFB lacks standing under this theory as well.

The Supreme Court has held that a plaintiff generally must assert his or her own legal rights and interests and may not rest his or her claim for relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). When asserting standing on its own behalf, an organization must be able to demonstrate some injury to the association itself that meets the constitutional standing requirements. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982).

This Court must conduct the same inquiry with respect to NFB as with an individual plaintiff: has NFB "alleged such a personal stake in the outcome of the controversy as to warrant [] invocation of federal-court jurisdiction"? *Havens Realty Corp.*, 455 U.S. at 378-379. "The enforcement provisions of Title III unambiguously require that the 'person' (be it an individual or entity possessing the cause of action) is being subjected, or is under threat of being subjected, to discrimination." *McDonald's*, *supra*, 213 F.R.D. at 209. Accordingly, in seeking to sue in its own right, NFB must itself have suffered an injury-in-fact. It clearly has not.

NFB's vague, unsupported assertions regarding "frustration of mission" and the "diversion of resources" fall well short of establishing that NFB ***itself*** suffered an injury-in-fact sufficient to confer organizational standing. *McDonald's*, 213 F.R.D. at 209 (in ruling that a disability rights organization asserting it suffered a "frustration of mission" injury did not have organizational standing, the court emphasized that the alleged injury was the result of defendant's purported discrimination against others, not the organization itself); *Spann v. Colonial Village, Inc.*, 899 F. 2d 24, 27 (D.C. Cir. 1990) ("An organization cannot, of course, manufacture the injury necessary to

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maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation.")

In *Small*, *supra*, the plaintiff disability rights organization asserted that it had organizational standing because the diversion of its organizational resources from core organizational activities towards legal efforts constituted an injury-in-fact. 388 F. Supp. 2d at 95. However, the complaint alleged that the organization initiated and joined lawsuits to enforce the ADA as part of its organizational mission. The court granted defendant's motion to dismiss as to organizational standing and stated, "in light of this stated organizational purpose, the court would be reluctant to find that any litigation expenses incurred by DIA involved a diversion of organizational resources from core organizational activities toward legal efforts." *Id.* at 95.

Indeed, in describing NFB's mission, NFB alleges that it seeks to "take any [ ] action which will improve the overall condition and standard of living of the blind." (Complaint, ¶ 20.) Given NFB's stated mission to "take any action" to achieve equality for the blind, the instant litigation seemingly ***advances***, rather than frustrates NFB's mission. *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 344 (D.N.J. 2003) (finding that an ADA advocacy organization had failed to show an impairment to its mission that would constitute an injury in fact and stating that, "absent evidence to the contrary, it appears that [the organization] is an organization whose primary purpose is ADA litigation"). Therefore, NFB cannot rely on organizational standing as a basis for asserting its First Cause of Action under the ADA.

2. The Second Cause Of Action Must Be Dismissed Because Plaintiffs Lack Standing To Sue Under The Unruh Civil Rights Act.

a. Plaintiff Hingson lacks standing because he has not himself been the victim of discrimination.

Under the Unruh Civil Rights Act ("Unruh"), disabled individuals are entitled to full and equal access to the accommodations, advantages, facilities, privileges or services of covered entities. Cal. Civ. Code § 51, *et seq*. Unruh authorizes an "aggrieved person" to sue for injunctive relief or damages. Hingson does not qualify as an "aggrieved person" because he has never ***personally*** been denied service or otherwise been discriminated against in his use of the uberX service. In fact, he

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cannot even use the uberX service because he has not created a Uber user account or accepted the User Terms and Conditions.

The cases interpreting Unruh "have consistently held that an individual plaintiff has standing to bring claims thereunder only if he or she ***has been the victim of the defendant's discriminatory act.***" *Surrey v. TrueBeginnings, LLC*, 168 Cal. App. 4th 414, (2008) (court held that individual who sued a defendant online matchmaking service after he "became aware" of discriminatory business practices even though he never subscribed to or utilized its online services did not have standing under Unruh) (emphasis added); *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App. 3d 1377, 1383 (1990) (determining that standing under the Unruh extends only to persons "actually denied full and equal treatment by a business establishment.").

In *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 175 (2007), the California Supreme Court acknowledged that "a plaintiff cannot sue for discrimination in the abstract, but must ***actually suffer*** the discriminatory conduct." (Emphasis added.) The *Angelucci* holding is fatal to Hingson's claim under Unruh. Because Hingson did not attempt to or actually create an account in order to request a ride using uberX, he did not suffer discrimination in any sense other than "in the abstract." *See also Koire v. Metro Car Wash*, 40 Cal. 3d 24, 34 (1985) (under Unruh, injury occurs when the discriminatory policy is applied to the plaintiff.) Thus, under *Angelucci*, Hingson lacks standing to seek relief (whether damages or injunctive relief) for violations of Unruh and his Second Cause of Action must be dismissed.

b. Plaintiff NFB lacks associational and organizational standing.

Like Hingson, NFB lacks standing to seek an injunction under Unruh.

First, NFB is not itself an "aggrieved party" under Unruh and accordingly, it does not have standing to sue in its own right. As noted above, a cause of action under Unruh is individual in nature. *Martin v. International Olympic Committee*, 740 F. 2d 670, 677 (9th Cir. 1984) ("the rights protected by the act are enjoyed by all persons, *as individuals*."). Unruh confers standing "upon the victims of the discriminatory practices…the California courts have not seen fit to endorse a more expansive interpretation of these standing requirements." *Midpeninsula Citizens for Fair Housing,* 221 Cal. App. 3d at 1386 (nonprofit organization lacked standing to sue apartment complex owners

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for allegedly discriminatory rental practices because the organization's civil rights had not personally been violated).

While an organization may be deemed an "aggrieved party," the Complaint does not assert that NFB itself experienced discriminatory treatment and it therefore lacks standing. Rather, the purported injury is based on the allegation that transportation providers using the uberX app discriminate against blind individuals with service animals, not that Uber, the transportation providers, or the app discriminates against NFB. To the extent NFB contends it is suffering an injury in the form of "frustration of mission" and "diversion of resources," NFB fails to plead an injury sufficient to confer standing. *See Midpeninsula Citizens for Fair Housing, supra,* 221 Cal. App. 3d at 1383.

Since NFB lacks personal standing under Unruh, it cannot seek an injunction to compel enforcement of Unruh based on the injuries allegedly suffered by its members. *Reyes v. Atlantic Richfield*, 12 F.3d 1464, 1471 (9th Cir. 1993) (court denied the existence of representative standing under Unruh, and ruled that a franchisee lacked standing to bring a racial discrimination suit on behalf of accountants and cashiers working at the franchise); *Bowden v. Redwood Institute for Designed Educ., Inc*., 1999 U.S. Dist. LEXIS 2881 *14-16 (N.D. Cal. 1999) ("plaintiff, not claiming membership in the asserted protected class, namely the disabled, may not…sue as a representative of the students under [] Unruh"); *Hous. Rights Ctr., Inc. v. Moskowitz*, 2004 U.S. Dist. LEXIS 28885 *9-10 (C.D. Cal 2004) (Non-profit corporation that sued defendants to redress alleged housing discrimination did not have standing to sue under Unruh, as standing is limited to "persons aggrieved" and public agency plaintiffs).

NFB's Second cause of action for an injunction under Unruh should therefore be dismissed.

3. Plaintiff Hingson Cannot Meet The Heightened Standing Requirement To Establish An Entitlement To Damages Under The Disabled Persons Act.

Hingson's Third Cause of Action under the DPA for monetary damages must be dismissed. (Complaint, ¶ 89.)

The DPA (Cal. Civ. Code sections 54-54.3) creates a private cause of action for damages. California courts have held that Section 54.3 incorporates a heightened standing requirement.

Urhausen v. Longs Drug Stores California, Inc. 155 Cal. App. 4th 254, 262 (2007). To maintain an action for damages pursuant to section 54.3, an individual must establish that he was denied equal access ***on a particular occasion***.[7] *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 183 (1990) (to recover monetary damages under Civil Code Section 54.3, plaintiff must show "he or she ***was denied equal access on a particular occasion***") (emphasis added); *Urhausen*, 155 Cal. App. 4th at 262 (to maintain an action for damages under the DPA, plaintiff must show that "he actually presented himself to the restaurant on a particular occasion, as any other customer would do, with the intent of being…served and to purchase food…in the manner offered…[and] actually encountered access to seating inside…the restaurant that was not full and equal").

Here, Hingson ***admits*** that he never created an Uber user account, that he never requested a ride through the uberX platform, and that he was never been refused service by an uberX driver. (Complaint, ¶ 48.) As such, Hingson failed to plead, and cannot plead, facts indicating that he suffered an actual denial of equal access on a particular occasion. Under well-settled California law, his claim for damages under the DPA must be dismissed for lack of standing.

4. The Fourth Cause Of Action For Declaratory Relief Necessarily Fails Because Plaintiffs Lack Standing.

Plaintiffs seek a declaration that Uber discriminates against blind persons in violation of the ADA, Unruh and the DPA. (Complaint, ¶ 92.) Federal Rule of Civil Procedure 57 permits parties to obtain a declaratory judgment to determine their rights and obligations in cases involving actual controversies. However, Rule 57 (and the related Declaratory Judgment Act)[8] does not expand the District Court's jurisdiction. Rather, a plaintiff seeking declaratory relief must establish an independent basis for the District Court's subject matter jurisdiction. *See Prasco, LLC v. Medicis Pharmaceutical Corp.*, 537 F. 3d 1329, 1335 (Fed. Cir. 2008) (holding a district court may exercise jurisdiction over a declaratory judgment action so long as the suit meets the case or controversy

[7] The Complaint explicitly states that Plaintiffs do not seek injunctive relief under section 55. (Complaint, ¶ 90.)
[8] Courts have held that the federal Declaratory Judgment Act, 28 U.S.C.A. §2201 et seq., is "mirrored by" and "functionally equivalent" to Rule 57. *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F. 3d 530, 534, n.8 (1st Cir. 1995).

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requirement of Article III of the Constitution, a requirement which includes "various more specific but overlapping doctrines rooted in the same Article III inquiry…including standing.")

Because Plaintiffs lack standing to pursue their First, Second and Third Causes of Action, their Fourth Cause of Action for declaratory relief also fails.

B. Even If Plaintiffs Have Standing, And They Do Not, Plaintiffs' First, Second And Third Causes Of Action Should Be Dismissed.

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*, 550 U.S. at 570; *see* Fed. R. Civ. P. 12(b)(6).

Dismissal can be based on the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F. 2d 696, 699 (9th Cir. 1988); *see also Robertson v. Dean Witter Reynolds, Inc.*, 749 F. 2d 530, 533-534 (9th Cir. 1984). While the Court must assume the Complaint's factual allegations are true, "legal conclusions need not be taken as true merely because they are cast in the form of factual allegations." *Silvas v. E*Trade Mortg. Corp.*, 421 F. Supp. 2d 1315, 1317 (S.D. Cal. 2006). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001). Rule 12(b)(6) also "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989).

1. The First Cause Of Action For Violation Of The ADA Should Be Dismissed To The Extent It Alleges Uber Is A Public Accommodation Or Owns, Leases, Or Operates A Place Of Public Accommodation.

Even if the Court determines that either one, or both, of the Plaintiffs have standing, it should nevertheless dismiss Plaintiffs' ADA claim to the extent it is based on the contentions that Uber is a public accommodation or owns, leases or operates a place of public accommodation.

Title III of the ADA provides generally that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). A place

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of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within one of twelve enumerated categories. *See* Section 42 USC § 12181(7)(A)-(L). Additional specific prohibitions for public accommodations are listed under Section 12182(b).[9]

a. The Uber app is not a place of public accommodation.

As Plaintiff admits, Uber "uses smart phone software applications to arrange rides between passengers and its fleet of drivers[.]" (Complaint, ¶ 22.) Websites, smartphone applications, virtual spaces or any variation thereof are not listed among Title III's twelve "places of public accommodation." *See* 42 USC § 12181(7)(A)-(L). These twelve categories are exclusive. If an entity does not fit into one of the categories, the entity is not a place of public accommodation.

Under Ninth Circuit law, a "place of public accommodation" is a physical place. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (concluding that places of public accommodation are "actual, physical places."); *Cullen v. Netflix, Inc*., 880 F. Supp. 2d 1017 (N.D. Cal 2012) (Video programming provider's motion to dismiss a hearing-impaired customer's claims that a streaming library violated Unruh was dismissed where the streaming video library was a website, not an actual physical place, and under judicial precedent, it was not a place of public accommodation under the ADA); *Young v. Facebook Inc*., 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (finding that Facebook was not place of public accommodation in Title III claim by mentally disabled plaintiff alleging failure to provide reasonable customer service upon deactivation of her account). Courts have largely rejected attempts to wedge virtual environments into the ADA's definition of public accommodations or expand the ADA's applicability to non-physical structures even when the entity has an actual physical location. *See Access Now, Inc. v. Southwest Airlines*, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fl. 2002) (noting cyberspace is a unique medium, with no particular geographical location, and therefore www.southwest.com was not place of public accommodation like ticket counter or travel agency), aff'd, 385 F.3d 1324, 1329 (11th Cir. 2004).

[9] For example, public accommodations are prohibited from (1) imposing eligibility criteria that screen out or tend to screen out disabled individuals; (2) failing to make reasonable modifications to policies, practices or procedures unless those modifications would "fundamentally alter" the nature of the service; (3) failing to provide auxiliary aids (e.g., interpreters) unless those aids are unduly burdensome; and (4) failing to remove architectural barriers. 42 U.S.C. § 12182(b)(1)-(2).

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As a smartphone application, Uber's app exists solely in a virtual environment. Accordingly, the app itself, the lone "service" Uber provides, is not a public accommodation under Title III as a matter of law.

Plaintiffs have not alleged the Uber app is itself a place of public accommodation, or that the app itself is inaccessible to blind individuals with service animals. In fact, Plaintiffs acknowledge being able to successfully access the Uber app to request transportation. (Complaint, ¶ 34.)

Plaintiffs allege instead that the ***vehicles*** providing transportation services on the uberX platform are places of public accommodation. (Complaint, ¶ 58.) However, as described below, Uber does not own, lease or operate these vehicles.

b. Uber does not own, lease or operate a place of public accommodation.

Throughout the Complaint, Plaintiffs state that uberX is a "taxi service" and that Uber owns, operates or leases a fleet of vehicles. Neither of these allegations is true, and, in fact, both are directly and expressly contradicted by the rules promulgated by the California Public Utilities Commission ("CPUC") governing "Transportation Network Companies" (TNCs), rules that Plaintiffs themselves rely upon in the Complaint. (Complaint, ¶¶ 9, 33.)

As stated in the Complaint, in September 2013, the CPUC issued a ruling designating uberX as a TNC. (RJN Exh. A at 25.) In finding that TNCs are charter-party carriers within the meaning of the California Public Utilities Code, the CPUC expressly distinguished "taxi services," which are regulated by cities and/or counties, and "charter-party carrier services" subject to regulation by the CPUC. (*Id.* at 11.) The CPUC also made clear that "[u]nlike taxi cabs, which may pick up passengers via street hails, PU Code § 5360.5 requires that charter party carriers operate on a prearranged basis. We find that TNCs operate on a prearranged basis." (*Id.* at 20.)

The CPUC's Rules go on to state that a TNC like uberX is "***not permitted to itself own vehicles used in its operation or own fleets of vehicles***." *Id.* at p. 24 (emphasis added). Plaintiffs contend that the vehicles themselves are places of public accommodation yet the CPUC has effectively ruled that Uber does not own or operate those "places of public accommodation."

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Adiutori v. Sky Harbor International Airport, 880 F. Supp. 696 (D. Ariz. 1995), aff'd without op., 103 F.3d 137 (9th Cir. 1996) is instructive. There, the plaintiff asserted that a skycap company providing services at an airport was bound by the requirements of the ADA by virtue of the fact that it was a private entity providing a service in a "terminal, depot, or other station used for specified public transportation," which are public accommodations under the ADA. *Id.* at 704. In ruling that the skycap company did not operate a place of public accommodation and, hence, could not be sued under Title III of the ADA, the district court pointed out that the ADA "does not state that it applies to entities which merely provide a service in a place of public accommodation, e.g. a terminal, etc.--it only applies to entities which own, lease or operate a place of public accommodation." *Id*. There was no evidence that the skycap company owned, leased, or operated the terminal at the airport; it possessed only a permit to conduct business in the terminal. *Id.* Accordingly, the court ruled there was no basis to hold the company liable under Title III of the ADA. *Id.*

Similarly, Uber's role is merely to provide to transportation providers a service (*i.e.* use of the app to connect with potential passengers) that is used to access the place of public accommodation: the transportation providers' vehicles. Because the Uber app itself is not a place of public accommodation, and given that the CPUC has ruled that Uber legally cannot own a fleet of vehicles (*i.e.* the places of public accommodation per Plaintiffs' Complaint), Plaintiffs have failed to allege sufficient facts to show that Uber owns, leases, or operates ***a place*** of public accommodation. To the extent Plaintiffs' ADA claim is premised on that contention, it must be dismissed.

2. The Second And Third Causes Of Action Should Be Dismissed To The Extent Based On The Allegation That Uber, As A Public Accommodation, Violated The ADA.

Under the Unruh Civil Rights Act ("Unruh"), a violation of the ADA constitutes a violation of Unruh. *See* Cal. Civ. Code § 51(f). Likewise, under the California Disabled Persons Act ("DPA"), a violation of the ADA constitutes a violation of the DPA. *See* Cal. Civ. Code § 54.1(d).

In their Second and Third Causes of Action, Plaintiffs assert that because Defendant violated the ADA, it also violated Unruh and the DPA. (Complaint, ¶¶ 80, 87.) To the extent Plaintiffs' Second and Third causes of action are based on the allegation that Uber owns, leases or operates a

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public accommodation as defined by the ADA, Plaintiffs' claims fail and should be dismissed for the same reasons described above.

IV. CONCLUSION

For the foregoing reasons, Uber respectfully requests that the Complaint be dismissed in its entirety due to Plaintiffs' failure to establish standing to sue under the ADA, Unruh or the DPA.

Alternatively, at a minimum, Uber requests that Plaintiffs' First, Second and Third Causes of Action be dismissed to the extent it is based on the allegation that Uber is a public accommodation or that Uber owns, operates or leases a place of public accommodation.

Dated: October 22, 2014

/s/*Andrew M. Spurchise*
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